In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1484

EDWARD R. FINK AND JOAN O. FINK, PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A-1, pp. 13-28) is reported at 454 F.2d 1387.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1972. The petition for a writ of certiorari was filed on May 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a married woman, domiciled with her husband in the community property state of Washington but residing with him outside the United States, is entitled to an exemption, under Section 911(a)(2) of the Internal Revenue Code of 1954, for her vested one-half interest in the salary received by her husband as a member of the United States Navy, on the theory that her share of such salary was not paid by the United States.

STATUTE INVOLVED

The pertinent provisions of Section 911 of the Internal Revenue Code of 1954 are set forth in the petition. (Pet. pp. 3-4.)

STATEMENT

Petitioners, Edward R. Fink and his wife Joan, domiciled in the community property state of Washington, lived in Japan from 1965 to 1967, during which time he served as a Naval officer in the Seventh Fleet. Joan, a housewife, performed no services for the United States. Petitioners filed a joint income tax return for 1965, in which they included 50 percent of Edward's Navy salary but excluded, as exempt, the other 50 percent, They based the exclusion on the theory that by virtue of the community property laws of Washington, Joan's (but not Edward's) one-half interest in the salary represented earned income received from sources without the United States,

which was not paid by the United States. Consequently, they alleged that under Section 911(a)(2) of the Internal Revenue Code of 1954, they were entitled to the claimed exemption. (Pet. App. A-1, pp. 13-15.) The Commissioner disallowed the exemption and petitioners paid the deficiency. The Court of Claims upheld the Service's denial of a refund and dismissed the petition. (Pet. App. A-1, p. 28.)

ARGUMENT

The decision below is plainly correct and there is no conflict of decisions or any other reason for review.

To be exempt from income tax under Section 911(a)(2), amounts received from sources without the United States must be both (1) earned income attributable to services and (2) not paid by the United States Government. The Court of Claims correctly held that the wife's share of her husband's salary as a Naval officer was paid by the United States. For federal tax purposes, the wife's share of the community property is considered income to her not because it is paid to her by the community in return for her labors in behalf of her husband, as petitioners assert, but rather because she has a vested right to half the income as it is earned by either as agent for the community. *Poe* v. *Seaborn*, 282 U.S. 101; *United States* v. *Mitchell*, 403 U.S. 190. Thus both husband and wife are deemed to receive community income from the same sources, in this case from the United States, even though the wife has not performed any compensable labor in behalf of the United States. As the

Court of Claims noted (Pet. App. A-1, pp. 22-23), under petitioners' interpretation of the statute, the exemption would be available to a wife domiciled in a community property state but not to a wife in a separate property state under an analogous factual situation. This result would frustrate the intent of Congress, reflected in the committee reports at the time it first enacted income splitting provisions for married couples, to give equivalent income tax benefits to couples domiciled in common-law and community property states.[1]

Petitioners argue (Pet. pp. 8-11) that it is unconstitutional to tax the wife's share of the community income as earned income paid by the United States, because it is taxing her on income earned by her husband and is therefore a direct tax not apportioned among the states. This theory reflects petitioners' misconception of community property law, for, as noted above, the income is not assigned by the husband in return for his wife's services to him. "By law, the earnings are never the property of the husband, but that of the community," which the husband has received as its agent. *Poe* v. *Seaborn*, *supra*, 282 U.S. at 117. Indeed, in *United States* v. *Mitchell*, *supra*, this Court held a wife liable for federal income taxes on her share of community income earned by here husband even though she renounced her rights to it under state law.

---

[1] Revenue Act of 1948, c. 168, 62 Stat. 110; S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 1, 24-25 (1948-1 Cum. Bull. 285, 303); H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 1, 23-24 (1948-1 Cum. Bull. 241, 259-260).

Petitioners also claim (Pet., p. 6) that they are victims of discriminatory treatment because wives who are nonresident aliens married to Naval officers domiciled in community property states are not taxed on their shares of community income.[2] As the court below correctly noted (Pet. App. A-1, pp. 27-28), there is no constitutional violation if nonresident aliens are not taxed as heavily as those who receive the rights, privileges and protections accorded to citizens.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

PHILIP R. MILLER,
DANIEL B. ROSENBAUM,
WILLIAM KALISH,
Attorneys.

JUNE 1972.

---

[2] See Rev. Rul. 56-269, 1956-1 Cum. Bull. 318.

[3] In fact, one of the privileges accorded petitioners as United States Citizens was the total exemption of their income, by treaty, from Japanese income taxes. See Income Tax Treaty with Japan, signed April 16, 1954, as amended by Protocol signed May 7, 1960, effective September 2, 1964, 15 U.S.T. 1539, Part 2, Article X.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 466643 627